Privy Council Appeal No. 94 of 1929.

Seth Nanhelal and another - - - - - - *Appellants*

v.

Umrao Singh and another - - - - - - *Respondents*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER OF THE CENTRAL PROVINCES.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 16TH DECEMBER, 1930.

Present at the Hearing:

LORD MACMILLAN.
SIR JOHN WALLIS.
SIR GEORGE LOWNDES.

[*Delivered by* SIR GEORGE LOWNDES.]

This is an appeal by special leave. It raises an interesting question as to execution proceedings which seems to be of not infrequent occurrence. Differing opinions have been expressed in India, particularly in the Court from which the appeal comes, and the matter calls for an authoritative decision. Under these circumstances it is a matter of regret to their Lordships that the respondents have not been represented before them.

The proceedings in question commenced with an award by the Registrar of Co-operative Societies, Central Provinces and Berar. By this award, the respondents were ordered to pay to the Manegaon Society a sum of Rs. 2109.2 with interest, and in default, certain immovable property of the respondents, which had been mortgaged to the Society, and which was described as Patti No. 2, half share of Mauza Bagada (or Bagra) Manegaon in the Hoshangabad District, was ordered to be sold. By virtue

of rules made by the Local Government under the Co-operative Societies Act, II, of 1912, the award was enforceable in the same manner as the decree of a Civil Court. The money not having been paid, execution proceedings were taken by the Society as decree holders and after the usual formalities, the property was, on the 15th September, 1923, put up to auction and knocked down to the appellants at the price of Rs. 7,100, of which the prescribed 25 per cent. was paid at the time of the sale.

On the 24th September, before the sale was confirmed, the respondents, the judgment debtors, put in what may be called the usual application to set aside the sale on the ground of fraud and irregularity in the conduct of the sale.

The law relating to such applications is contained in O. XXI, Rules 89–92, which are in the following terms :—

89.—(1) Where immovable property has been sold in execution of a decree, any person either owning such property or holding an interest therein by virtue of a title acquired before such sale, may apply to have the sale set aside on his depositing in Court—

(*a*) for payment to the purchaser, a sum equal to five per cent. of the purchase money, and

(*b*) for payment to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder.

(2) Where a person applies under Rule 90 to set aside the sale of his immovable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule.

(3) Nothing in this rule shall relieve the judgment-debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale.

90.—(1) Where any immovable property has been sold in execution of a decree, the decree-holder, or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it ;

Provided that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

91. The purchaser at any such sale in execution of a decree may apply to the Court to set aside the sale, on the ground that the judgment-debtor had no saleable interests in the property sold.

92.—(1) Where no application is made under Rule 89, Rule 90 or Rule 91, or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute.

(2) Where such application is made and allowed, and where in the case of an application under Rule 89, the deposit required by that rule is made within 30 days from the date of sale, the Court shall make an order setting aside the sale.

Provided that no order shall be made unless notice of the application has been given to all persons affected thereby.

(3) No suit to set aside an order made under this rule shall be brought by any person against whom such order is made.

On this application, issues were framed by the Subordinate Judge of Hoshangabad and the matter proceeded to trial, the confirmation of the sale standing over to await the result.

On the 15th June, 1924, when there appeared to be some chance of the proceedings coming to an end, the company came forward with another application, alleging that the judgment debt had been adjusted as between them and the respondents who had executed a mortgage in their favour on the 10th May, 1924, to cover the outstanding amount of the debt, and that in consideration thereof, they (the company) had agreed to accept payment by instalments. It was accordingly prayed that the adjustment might be recorded and certified, and that the Manegaon property which had been sold to the appellants might be released.

New issues were framed on this application and incorporated in the existing inquiry, which was prolonged till the 19th January, 1925, when the Subordinate Judge delivered a combined judgment on the two applications. On the first, he held in effect that no case of fraud has been made out, and that though certain irregularities had been established with regard to the sale, they had not resulted in substantial injury to the respondents. He therefore thought that the sale could not be set aside and he accordingly rejected the respondents' application. Upon this finding, the Judge was bound by Rule 92 of the order above quoted to confirm the sale, which thereupon would become absolute, subject, of course, to any variation on appeal. No such order, however, was in fact made.

The issues framed on the Company's application raised questions as to the bona fides of the new mortgage, on which the Subordinate Judge held that it was collusive and fraudulent, and entered into with the purpose of defeating the rights of the appellants as purchasers. Issues 6 and 9, which have given rise to the present appeal, were as follows :—

> 6. Has the Court no jurisdiction to confirm the sale in view of the fact that the decree-holder has admitted satisfaction of the decree ?
>
> 9. Has any interest or title accrued to the purchaser under the auction sale, and if so, could it be defeated by a compromise arrived at in his absence ?

On these issues the Subordinate Judge declined to follow the ruling of a single judge of the Judicial Commissioner's Court (*Nilkanth* v. *Yeshwant*, 18 Nag., L.R. 134), preferring to be guided by the opinion of the Calcutta Appeal Court in a case (*Bibi Sharafan* v. *Muhammad Habibuddin*, 15 Calc. W.N. 685), which had not been cited in the first mentioned case. He therefore held against the Company on these issues also, and rejected their application.

The respondents appealed to the District Court against the rejection of both applications, joining as respondents the Company.

the present appellants, and certain other interested persons who are not before their Lordships. The grounds set out in their memorandum of appeal covered all the issues decided under their own application in the lower Court, and also those involved in the application of the Company. It will be sufficient to set out the 15th paragraph of the memorandum :—

> 15. When both the judgment-debtor and decree-holder say that the decree has been satisfied out of Court, the lower Court was bound to enter satisfaction under O. XXI, r. 2. It erred in refusing to follow the ruling of our own High Court (18 Nag., L.R. 134).

The appeal came on in due course before the District Judge of Hoshangabad, who, unfortunately, as their Lordships think, dealt only with the contention raised by paragraph 15 of the memorandum of appeal, leaving the other questions at issue between the parties undecided. He was of opinion that the contention of the respondents so raised was " obviously correct," and held that under the circumstances the lower Court was bound to set aside the sale, and he made an order to that effect.

The appellants being dissatisfied with this determination, applied in revision to the Court of the Judicial Commissioner, asking that the order of the District Court should be set aside. Their application was heard by Mitchell, A.J.C., who delivered a well-reasoned judgment on the 26th August, 1926. He clearly thought that the case of *Nilkanth* v. *Yeshwant* had been wrongly decided and he submitted the papers to the Judicial Commissioner for reference to a Full Bench. A reference was at first ordered, but was subsequently cancelled as the same question was already pending before a Full Bench in another case.* The final decision on the appellants' application therefore stood over to await the judgment of the Full Bench, and this having apparently been against the contentions of the present appellants, their application for revision was eventually dismissed.

It appears from the record before their Lordships that there had been considerable conflict of opinion in the Court of the Judicial Commissioner on this subject, though the only reported case is that of *Nilkanth* v. *Atcuaram*, in which Kotwal, A.J.C., was of opinion that an adjustment between the decree-holder and the judgment-debtor come to at any time before confirmation of an execution sale nullified the decree, taking away " the very foundation of the Court's power to execute the decree, viz., the existence of a decree capable of execution."

Their Lordships are unable to concur in this reasoning. In the first place, O. XXI r. 2, which provides for certification of an adjustment come to out of Court clearly contemplates a stage in the execution proceedings when the matter lies only between the judgment-debtor and the decree-holder, and when no other interests have come into being. When once a sale has been

* *Maroti* v. *Vithoba and another*, not reported.

effected, a third-party interest intervenes, and there is nothing in this rule to suggest that it is to be disregarded. The only means by which the judgment-debtor can get rid of a sale, which has been duly carried out, are those embodied in rule 89, viz., by depositing in Court the amount for the recovery of which the property was sold, together with 5 per cent. on the purchase money, which goes to the purchaser as statutory compensation, and this remedy can only be pursued within 30 days of the sale—*see* Art. 166, Sch. I of the Limitation Act, 1908. That this is so is, in their Lordships' opinion, clear under the wording of rule 92, which provides that in such a case (*i.e.*, where the sale has been duly carried out), if no application is made under rule 89 "the Court *shall* make an order confirming the sale and thereupon the sale shall become absolute." Their Lordships make no reference to cases under rule 91 which has no application to the present case. They only desire to add that the view they have expressed above accords with the judgment of Mitchell, A.J.C. in the present case, with that of the Calcutta Judges in *Bibi Sharafan* v. *Muhammad Habibuddin* (supra) and, they think, with that of Hallifax, A.J.C., when it was under consideration in the present case whether leave should be given in India to appeal to His Majesty in Council.

Their Lordships greatly regret that the conclusion to which they have come will not finally determine the questions in dispute between the parties, in view of the fact that when the case was before the District Court in appeal, the other matters raised by the respondents under rule 90, were left open, and their consideration is therefore not competent in this appeal. Their Lordships would reiterate what has been said by the Board on many previous occasions, that fragmentary decisions of this character are most inconvenient, and tend to delay the administration of justice.

For the reasons given above their Lordships will humbly advise His Majesty that this appeal should be allowed, that the orders of the Court of the Judicial Commissioner in revision, and of the District Court in appeal should be set aside, and that the case should be referred back to the District Court for decision of the questions still standing for determination before it under O. XXI, r. 90 of the Code of Civil Procedure. The respondents must pay the costs of the hearing before the District Judge in appeal and in all subsequent proceedings. All other costs in India will be dealt with by the District Judge.

The respondents will pay the costs of this appeal.

In the Privy Council.

SETH NANHELAL AND ANOTHER

v.

UMRAO SINGH AND ANOTHER.

DELIVERED BY SIR GEORGE LOWNDES.

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